BEFORE THE PUBLIC SERVICE COMMISSION

OF SOUTH CAROLINA

DOCKET NO. 2019-185-E
DOCKET NO. 2019-186-E

In the Matter of: South Carolina Energy Freedom Act (H.3659) Proceeding to Establish Duke Energy Carolinas, LLC's and Duke Energy Progress LLC's Standard Offer Avoided Cost Methodologies, Form Contract Power Purchase Agreements, Commitment to Sell Forms, and Any Other Terms or Conditions Necessary (Includes Small Power Producers as Defined in 16 United States Code 796, as Amended) – S.C. Code Ann. Section 58-41-20(A)	)	**DUKE ENERGY CAROLINAS, LLC's AND DUKE ENERGY PROGRESS, LLC'S RESPONSE AND CONTINUING OBJECTION TO JDA/SCSBA'S PROPOSALS REQUESTING COMMISSION APPROVAL OF LONGER-TERM PURCHASED POWER AGREEMENTS UNDER S.C. CODE § 58-41-20(F)(1)**

Duke Energy Carolinas, LLC ("DEC") and Duke Energy Progress, LLC ("DEP" and, together with DEC, the "Companies" or "Duke"), by and through counsel, hereby respond to and object to Section IV.F "Proposals for PPAs with a Duration Longer than Ten Years" of the Joint Proposed Order filed with the Commission by the South Carolina Solar Business Alliance, Inc. ("SCSBA") and Johnson Development Associates, Inc. ("JDA") on November 8, 2019 in the above captioned-proceedings.

As further addressed herein, the Commission should reject the Section IV.F proposal of JDA and SCSBA (the "Proposal") for the following reasons:

(1) JDA/SCSBA's failure to more timely submit the Proposal has effectively precluded Duke and other parties from submitting testimony informing the Commission regarding how the Proposal fails to meet fundamental requirements of Act 62.

(2) The Proposal fails to meet the clear legal requirements of Act 62, including that a fixed price power purchase agreement ("PPA") proposed by intervening parties for a period longer than 10 years shall include a "reduction in the contract price relative to the ten year avoided cost."

(3) The Proposal effectively constitutes new evidence in contravention of Order No. 2019-128-H.

(4) JDA/SCSBA have mischaracterized the evidence before the Commission to create the false impression that the Proposal is supported in the record.

(5) As previously addressed in Duke's response to Order No. 2019-126-H, adoption of the Proposal would violate the South Carolina Administrative Procedures Act ("APA"), the Commission's rules of practice and procedure, and the Companies' and the other parties' procedural due process rights.[1]

I. Background and Introduction

The procedural posture of this case has been well documented in prior pleadings and, in the interest of brevity, the Companies will not repeat it here. More recently, on October 23, 2019, SCSBA and JDA proposed to make a post-hearing submission of a proposed alternative power purchase agreement ("PPA") structure for a contractual term longer than 10 years under authority provided by S.C. Code Ann. § 58-41-20(F)(1). That section of Act 62 provides:

> (F)(1): Electrical utilities, subject to approval of the commission, shall offer to enter into fixed price power purchase agreements with small power producers for the purchase of energy and capacity at avoided cost, with commercially reasonable terms and a duration of ten years. The commission may also approve commercially reasonable fixed price power purchase agreements with a duration longer than ten years, which must contain ***additional terms, conditions, and/or rate structures as proposed by intervening parties and approved by the commission, including but not***

[1] *Duke Energy Carolinas LLC's and Duke Energy Progress LLC's Response to Order No. 2019-126-H*, at 4-5 (filed Oct. 28, 2019).

> ***limited to, a reduction in the contract price relative to the ten year avoided cost***. Notwithstanding any other language to the contrary, the commission will ***make such a determination in proceedings conducted pursuant to Section 58-41-20(A)***. The avoided cost rates applicable to fixed price power purchase agreements entered into pursuant to this item shall be based on the avoided cost rates and methodologies as determined by the commission pursuant to this section. The terms of this subsection apply only to those small power producers whose qualifying small power production facilities have active interconnection requests on file with the electrical utility prior to the effective date of this act. The commission ***may determine any other necessary terms and conditions deemed to be in the best interest of the ratepayers***. This item is not intended, and shall not be construed, to abrogate small power producers' rights under PURPA that existed prior to the effective date of the act. (emphasis added).

On October 24, 2019, the Commission issued Order No. 2019-126-H, in the above-captioned proceedings, allowing parties to comment on the JDA/SCSBA request to make a post-hearing submission of a new PPA proposal. On October 28, 2019, Duke objected to the JDA/SCSBA request to introduce new evidence in the form of late-filed PPA proposals after the evidentiary hearing concluded. On October 31, 2019, the Commission issued Order No. 2019-128-H, which established that it would not be appropriate for JDA and SCSBA to offer new evidence after the hearing, but accepted that it would be "permissible to include proposals that are <u>based on the evidence and testimony in the record of the case</u> in proposed orders." (emphasis in original).

On November 8, 2019, JDA and SCSBA jointly filed their proposed order. Section IV.F addresses these parties' recommendation for the Commission to adopt "Proposals for PPAs with a Duration Longer than Ten Years."[2] Beginning on page 71 of JDA/SCSBA's proposed order, JDA/SCSBA set forth their interpretation of the evidence in the record addressing the risks and benefits of PPA proposals for terms longer than 10 years. On pages 76-83, JDA/SCSBA present proposed Commission findings and conclusions, including, for the first time, presenting two

[2] JDA/SCSBA Proposed Order, at 71.

optional longer-term PPA proposals that these parties recommend the Commission approve under subsection (F)(1) of Act 62.

Option 1 of the Proposal recommends the Commission approve "longer 'dispatchable' PPAs" at rates "fixed at the ten-year avoided cost rate for Large QFs (as calculated in accordance with this Order)."[3] The dispatch and curtailment provisions of the dispatchable PPA would be "substantively identical to the Tranche 2 CPRE contracts Duke has currently proposed in North Carolina."[4]

Option 2 of the Proposal recommends the Commission approve optional "PPAs with a term longer than ten years that provide for a 'reset' of avoided cost rates under the PPA after ten years."[5] JDA/SCSBA proposes that the PPA "would be for an initial term of ten years, at ten-year avoided cost rates," and the "QF would have the right to extend the contract for an additional term of up to ten years, at the QF's election. Rates during the second term of the contract would be adjusted to match the then-current avoided cost rates corresponding to the duration of the second term of the contract . . . ."[6] JDA/SCSBA provide no explanation as to the contractual language or mechanism to support this "extension right" under Option 2. It is also unclear whether the dispatch and curtailment provisions incorporated into Option 1 would also be included in Option 2, although JDA/SCSBA's summary of Option 2 does included similar qualifying language that North Carolina contract provisions surrounding dispatchability and curtailment would control to the

[3] JDA/SCSBA Proposed Order, at 81-82.
[4] JDA/SCSBA Proposed Order, at 82.
[5] JDA/SCSBA Proposed Order, at 82.
[6] *Id*.

extent those provisions directly conflict with the contract provisions of the Companies' Large QF PPA filed by Duke in these proceedings.[7]

II. Argument

A. JDA/SCSBA's failure to more timely submit the Proposal has precluded Duke and other parties from submitting testimony informing the Commission regarding how the Proposal fails to meet fundamental requirements of Act 62.

Duke's fundamental concern with JDA/SCSBA's seemingly purposeful strategy to file a proposal under subsection (F)(1) after the close of the evidentiary hearing has been that parties would have no opportunity to address whether the proposal complies with fundamental requirements of Act 62. First, JDA/SCSBA's failure to timely file the Proposal effectively prohibits Duke, ORS or intervenors from providing testimony on the potential risks placed upon the using and consuming of such proposal, pursuant to S.C. Code Ann. § 58-41-20(A), in order to inform the Commission's decision. Similarly, in considering "additional terms, conditions, and/or rate structures as proposed by intervening parties" to support a longer-term PPA, S.C. Code Ann. § 58-41-20(F)(1) directs the Commission to "determine any other necessary terms and conditions deemed to be in the best interest of the ratepayers." Because JDA/SCSBA waited until this late stage of the proceeding to submit its proposals, after the evidentiary record has closed, there is no opportunity for the Commission to hear from witnesses from Duke, ORS, or intervenors about whether additional terms and conditions are necessary to ensure the longer-term PPA proposals are in the best interest of ratepayers. Finally, Act 62 establishes a clear legal requirement that longer-term fixed price PPAs in excess of 10 years shall include a "reduction in the contract price relative to the ten year avoided cost" in order to mitigate the risk of such contracts on customers.

[7] JDA/SCSBA Proposed Order, at 83 (Describing the form of PPA for Option 2, explaining "Otherwise the terms and conditions of such contracts would be identical to those approved for the Large QF PPA in this docket (except to the extent those provisions directly conflict with the dispatchability and curtailment provisions of the PPA).").

JDA/SCSBA creatively suggest that the Proposal either meets this decrement requirement in spirit[8] or that it does not apply.[9] Duke disagrees with these creative legal interpretations, as both options presented in JDA/SCSBA's Proposal seek Commission approval of PPAs at prices to be fixed by the Commission—whether now or in the future—for contract terms that extend for longer than 10 years.

B. Aspects of the Proposal effectively constitute new evidence in contravention of Order No. 2019-128-H.

Order No. 2019-128-H held that it would "be inappropriate to attempt, at this time, to enter additional evidence or testimony into the record" and provided that JDA/SCSBA could attempt to support a proposal in proposed orders "based on the evidence and testimony in the record of the case." (emphasis in original).

Numerous aspects of the Proposal effectively introduce "additional evidence" not in the record of the case, in contravention of Order No. 2019-128-H. It is effectively impossible to for the Commission to consider JDA/SCBA's proposal without considering the new evidence presented by JDA/SCSBA. First, while Duke agrees that Duke's witnesses provided testimony generally supporting system operational benefits associated with the economic dispatch and curtailment rights under North Carolina CPRE Program, JDA/SCSBA's inclusion in Option 1 of the Proposal that "any dispatch in excess of those amounts would have to be compensated at full avoided cost rates" is not addressed anywhere in the record.[10] Accordingly, introduction of this issue represents new evidence before the Commission. Similarly, no testimony exists in the record

[8] JDA/SCSBA Proposed Order, at 82. (arguing "the expected decrease in project revenues based on the utility's uncompensated curtailment rights satisfies [this decrement requirement]").
[9] JDA/SCSBA Proposed Order, at 83. (arguing "because such contracts would not have rates fixed for a period of longer than ten years, Act 62's requirement of a reduction in contract price relative to the ten-year avoided cost rate does not apply").
[10] JDA/SCSBA Proposed Order, at 81.

to support JDA/SCSBA's assertion that "the expected decrease in project revenues based on the utility's uncompensated curtailment rights satisfies Act 62's [decrement] requirement" relative to the 10-year avoided costs.[11] Finally, the actual dispatch and curtailment contract provisions set forth in the Proposal are not based upon any "terms and conditions" put forward in these proceedings. JDA/SCSBA, instead, suggest these contract provisions should be "identical to the Tranche 2 CPRE contracts Duke has currently proposed in North Carolina."[12] Again, the introduction of these issues also represents new evidence before the Commission. Similarly, JDA/SCSBA's proposed order fails to identify any underlying evidence to support Option 2 of the Proposal as reasonable or compliant with Act 62, and thus, Option 2 represents new evidence presented to the Commission for the first time in JDA/SCSBA's proposed order. In sum, because JDA/SCSBA's Proposal is effectively new evidence before the Commission, the Proposal should be rejected.

C. Even if the Commission were to somehow determine the Proposal is not new evidence, there is not substantial evidence in the record "as proposed by intervening parties . . ." to support the Proposal.

In addition to presenting new evidence in the form of the Proposal itself, the underlying evidence put forward by JDA/SCSBA into the record fails to satisfy even the most basic evidentiary requirements. Subsection (F)(1) specifically requires that longer term PPAs "must contain additional terms, conditions, and/or rate structures ***as proposed by intervening parties*** . . . ." (emphasis added). As the Commission is well aware, Commission decisions must be grounded in "substantial evidentiary support in the record" to support the its findings and conclusions. *See Nucor Steel, a Div. of Nucor Corp. v. S.C. Pub. Serv. Comm'n*, 310 S.C. 539, 545, 426 S.E.2d 319, 323 (1992); *see also Lark v. Bi–Lo*, Inc., 276 S.C. 130, 135–36, 276 S.E.2d 304, 307 (1981).

[11] JDA/SCSBA Proposed Order, at 82.
[12] JDA/SCSBA Proposed Order, at 83.

Because JDA/SCSBA failed to timely present proposals under subsection (F)(1), and because Order No. 2019-128-H appropriately did not allow them to present new evidence, there is not substantial evidentiary support in the record to support the Proposal.

First, several provisions of the Proposal raise issues on which the Commission has never heard testimony. For example, the issue of the amount of compensation to be paid to QFs by Duke for curtailment (*i.e.*, for energy not produced) is a complex legal issue under PURPA and one that is not addressed whatsoever in the evidentiary record. It would be improper for the Commission to reach a conclusion on this issue—effectively requiring customers to pay QFs not to generate electricity— without considering any evidence on the issue, as the Proposal would require. Similarly, no testimony exists in the record regarding the interpretation of S.C. Code Ann. § 58-41-20(F)(1) and the decrement required to the ten-year avoided cost, much less any testimony that supports JDA/SCSBA's assertion that "the expected decrease in project revenues based on the utility's uncompensated curtailment rights satisfies Act 62's [decrement] requirement" relative to the 10-year avoided costs.[13] In the proposed order, JDA/SCSBA contemplate that the South Carolina Large QF PPA provisions will apply "except to the extent those provisions directly conflict with the dispatchability and curtailment provisions of the PPA,"[14] without providing any explanation or detail as to which terms and conditions of the Large QF PPA would need to be revised or the manner in which JDA/SCSBA suggests they should be revised. While the Companies' witnesses generally describe curtailment provisions or dispatch rights to be a favorable provision of the CPRE Program PPAs, no testimony has been received with regard to the specific curtailment provisions set forth in the Proposal, much less the impact such provisions would have on other provisions of the Large QF PPA and how those impacts would be resolved.

[13] JDA/SCSBA Proposed Order, at 82.
[14] JDA/SCSBA Proposed Order, at 82, 83.

The Commission has not received evidence to support a determination as to the reasonableness of the specific curtailment amounts set forth in the Proposal, or whether additional curtailment or less curtailment would be in the best interest of customers.

Looking to evidence presented by JDA, Duke does not dispute that JDA Witness Chilton generally advocated for PPA terms longer than 10 years for purposes of expanding financing (and profit) opportunities for QFs. However, at no point did she put forward any "appropriate statutory conditions" that would meet the requirements of S.C. Code Ann. § 58-41-20(F)(1).[15] Indeed, JDA Witness Chilton herself conceded this point during the hearing when she expressly declined to offer a proposal on behalf of JDA when asked by the Commission. (Tr. Vol. 2, p. 355.)

The only purported "intervenor support" for proposed additional terms and conditions presented in the JDA/SCSBA proposed order is their summary discussion of SCBSA Witness Davis' testimony. JDA/SCSBA's proposed order states: "SCSBA Witness Davis, on behalf of the intervenors, goes on to offer testimony that supports "dispatchable PPAs" of 20 years in South Carolina just as are offered in North Carolina."[16] However, reviewing Mr. Davis's hearing testimony that is cited in the JDA/SCSBA proposed order suggests that he was making a different point and not advocating for specific additional terms, conditions, and/or rate structures to be approved by the Commission to support PPA terms longer than 10 years. His actual testimony was: "Duke did not propose a dispatchable PPA in this proceeding. They're -- they are allowed to do that. If they would prefer a dispatchable PPA to the PPAs that are currently being proposed, that is available to them to do. They have not proposed that." (Tr. Vol. 2, p. 795-796.) This

[15] Both Ms. Chilton's pre-filed direct and surrebuttal testimony recognized that appropriate statutory conditions are required but did not actually put forward a proposal on behalf of JDA. (Tr. Vol. 2, p. 621.23.)

[16] JDA/SCSBA Proposed Order, at 73.

statement provides no support for the proposals presented by JDA/SCSBA in their proposed order.[17]

JDA and SCSBA also attempt to leverage Duke's and ORS's testimony to support the Proposal. However, this testimony provides only de minimis, tangential support for the two PPA proposals put forward for the first time in JDA/SCSBA's proposed order. While Duke Witness Holeman does testify to the operational limitations of PURPA PPAs and the enhanced dispatch capabilities and system operational benefits of PPAs under the CPRE Program, Duke's unequivocal position on longer term PPAs is presented by Duke Witness Brown: "The Companies do not support offering longer term fixed price PPAs in excess of 10 years unless the price is determined pursuant to a competitive procurement framework. Offering administratively-determined forecasted longer term fixed price PPAs is not mandated by Act 62 and is not in the best interest of customers unless obtained through a competitive solicitation process like CPRE." (Tr. Vol. 2, p. 621.22.) Thus, Duke's testimony cannot be relied upon to provide the substantial evidence required to support the Proposal. Similarly, at no point in the record does ORS Witness Horii put forward any proposals for a PPA longer than 10 years, nor does ORS present a position with regard to any of the provisions set forth in the Proposal—which is not unsurprising given JDA/SCSBA's failure to put forward any proposals upon which parties may comment.

The Companies note that JDA/SCSBA's proposed order does not even present these proposals in their summary of the evidence before the Commission; instead, they introduce them for the first time in their proposed Commission determination of this issue. This effectively puts

[17] Mr. Davis is also incorrect in his assertion that Duke could have presented a dispatchable PPA proposal, as subsection (F)(1) requires alternative terms and conditions to be "proposed by intervening parties" while subsection (H) limits Duke's mandatory PPA option to comply with Act 62 to system emergency curtailments only. S.C. Code Ann. § 58-41-20(F)(1), (H).

the Commission itself—not intervenors—in the position of formulating these proposals. It also reflects the fact that neither option is supported by substantial evidence in the record.

In sum, in addition to introducing new evidence in contravention of Order No. 2019-128-H, JDA/SCSBA have also asked the Commission to make factual findings regarding the appropriateness of the Proposal that are not supported by substantial evidence in the evidentiary record of these proceedings. Accordingly, the Commission should reject the late-filed Proposal submitted in JDA/SCSBA's proposed order in light of the clear lack of record evidence to support these proposals.

D. JDA and SCSBA have mischaracterized the evidence before the Commission to create the false impression that the Proposal is supported by the record.

JDA/SCSBA have mischaracterized the evidence in the record to create the false impression that the record supports the Proposal when, in fact, it does not. First, JDA/SCSBA repeatedly emphasize that ORS Witness Horii did not identify ***any*** overpayment risk associated with longer term contracts.[18] However, Mr. Horii's testimony in this regard was focused on seasonal allocation and vintages of QF contracts and does not support the broad proposition asserted by JDA/SCSBA. (Tr. Vol. 2, p. 528.8-9, 543-546.) He specifically explains that ". . . here I'm really focusing on sort of how you should price current solar versus future solar. And so I'm saying there's no overpayment risk there. The term of the contract could imply, you know -- you know, more overpayment risk . . . ." (Tr. Vol. 2, p. 546.) Second, JDA/SCSBA present Duke Witness Brown's hearing testimony completely out of context to argue that "the Companies expressly acknowledged that intervenors proposed terms in this proceeding greater than ten years."[19] A fair reading of Mr. Brown's testimony supports Duke's view that—if timely

[18] JDA/SCSBA Proposed Order, at 75-76, 78.
[19] JDA/SCSBA Proposed Order, at 81.

presented—"other parties can ask for contracts that are longer than that ten years, even -- I believe they could be asked for before that 20 percent of peak." (Tr. Vol. 2, p. 689.) Mr. Brown also specifically testified on redirect that no parties, including JDA, had put forward proposals compliant with the statutory requirements of Section (F)(1). (Tr. Vol. 2, p. 747-749.) Third, JDA/SCSBA's critique that "ratepayer-intervenors Wal-Mart and SCEUC were both represented in these hearings and did not put forth any testimony or evidence opposing terms of PPAs greater than ten years" is a disingenuous characterization given that no PPAs longer than 10 years were actually put forward prior to JDA/SCSBA filing their proposed order.[20] Finally, in summarizing the Power Advisory Report's discussion and conclusions on this issue, JDA/SCSBA fail to note that the Power Advisory Report expressly found that Power Advisory did not review the appropriateness of any intervenor proposal because "Power Advisory did not receive these prior to submission of [its] report."[21]

E. Duke continues to object to JDA/SBA's introduction of new alternative PPA proposals after the evidentiary hearing has concluded and the record is closed in these proceedings.

S.C. Code Ann. § 58-41-20(F)(1) is clear that the Commission must review alternative PPA proposals "as proposed by intervening parties . . . in proceedings conducted pursuant to Section 58-41-20(A)." Act 62 also establishes clear procedural requirements for the Commission to follow in proceedings to implement S.C. Code Ann. § 58-41-20, including allowing for "intervention, discovery, filed comments or testimony, and an evidentiary hearing." S.C. Code Ann. § 58-41-20(A)(2). By submitting proposals after the conclusion of the evidentiary hearing, JDA and SCSBA have circumvented the procedural requirements of Act 62 because no opportunity for

[20] JDA/SCSBA Proposed Order, at 78.
[21] Power Advisory Report, at 36.

intervention, discovery, or responsive testimony exists. Accordingly, no such proposal can be properly considered in these proceedings.

JDA and SCSBA have not explained why they elected not to timely propose "additional terms, conditions, and/or rate structures" for consideration by Duke, ORS, and other customer intervenors who will be obligated to pay for the QF power under the avoided cost rates approved by the Commission in these proceedings. Despite JDA and SCSBA filing direct testimony on September 11, 2019, and subsequently filing surrebuttal testimony on October 11, 2019, it is uncontroverted that neither of these parties elected to put forward a proposal that even attempted to conform to the mandates of S.C. Code Ann. § 58-41-20(F)(1) until the filing of proposed orders, as allowed by the Commission's Order No. 2019-128-H. As noted above, at the hearing, Witness Chilton expressly also declined to offer a proposal on behalf of JDA when asked by the Commission. (Tr. Vol. 2, p. 355.) This purposeful procedural strategy on the part of JDA and SCSBA has effectively deprived Duke, ORS, and other parties the opportunity to review, conduct discovery, and meaningfully respond to the proposal in violation of the procedural requirements of Act 62. Act 62 clearly and unambiguously requires the Commission to provide for "comments or testimony, and an evidentiary hearing" in proceedings to implement S.C. Code Ann. § 58-41-20(A) and then explicitly provides that any intervenor proposals submitted under subsection (F)(1) must be considered "in proceedings conducted pursuant to Section 58-41-20(A)." If the General Assembly had intended for intervenors to simply wait until after the evidentiary hearing to put forward such proposals, it seems like express recognition of this special accommodation and clear deviation from general Commission practice—as well as every other procedural aspect of these proceedings—would have been provided for in Act 62. In sum, because any determination by the Commission to approve contracts with a duration of longer than ten years must be predicated on specific proposals from intervenors that comply with S.C. Code Ann. § 58-41-20(F)(1) and are entered into the evidentiary record during proceedings conducted pursuant to S.C. Code Ann. § 58-41-20(A), the Commission should reject the proposals from JDA and SCSBA presented in their proposed order as both untimely and procedurally deficient.

In this regard, Duke also reiterates, maintains, and preserves its prior objection set forth in the Companies' October 28, 2019 Response to Order No. 2019-126-H that any prospective JDA/SCSBA proposal would violate the South Carolina APA, the Commission's rules of practice and procedure, and the Companies' and the other parties' procedural due process rights.[22] The requirements of the APA and the fundamental requirements of due process cannot be satisfied with respect to any JDA and SCSBA proposal formulated and presented after the conclusion of the evidentiary hearing.

III. Conclusion

Wherefore, DEC and DEP respectfully request that the Commission reject JDA's and SCSBA's proposals presented in Section IV.F of their joint proposed order for the reasons stated herein.

Respectfully submitted, this the 12th day of November 2019.

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[22] *Duke Energy Carolinas LLC's and Duke Energy Progress LLC's Response to Order No. 2019-126-H*, at 4-5 (filed Oct. 28, 2019).

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